Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

LEONARDO FIRMO ROSQUETE,

Petitioner,

vs.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED FOR REVIEW

Whether the Petitioner is entitled to be resentenced where his trial counsel gave specific legal advice to an individual after learning that his interests conflicted with those of the Petitioner, and where that individual—following counsel's advice—testified against the Petitioner at his sentencing hearing.

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No.

In The

Supreme Court of the United States

October Term, 1995

LEONARDO FIRMO ROSQUETE,

Petitioner,

vs.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Leonardo Firmo Rosquete ("Rosquete") respectfully prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on July 20, 1995, as refused to remand his case for a new sentencing hearing.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit in *United States v. Rosquette*[1], __ F.3d __ (11th Cir. 1995), *rehearing denied*, __ F.3d __ (1995) is reproduced in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit, affirming the petitioner's conviction, was entered on May 30, 1995. On June 20, 1995, the petitioner timely filed a suggestion for rehearing en banc. The court below entered an order denying the petition and suggestion for rehearing on July 20, 1995. [Appendix B]. This petition is filed within ninety (90) days of that date. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner contends that he was deprived of his right to the assistance of counsel under the Sixth Amendment to the United States Constitution. The Sixth Amendment provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

1. The trial court and the appeals court spelled the petitioner's last name "Rosquette." The correct spelling is "Rosquete."

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Relevant Procedural History

On October 1, 1981, agents from the Drug Enforcement Agency arrested the petitioner Leonardo Firmo Rosquete. On October 7, 1981, a federal grand jury sitting in the Middle District of Florida charged the petitioner with three counts of a five count indictment. [81-12(S)-Cr-Oc-20]. Count One charged the petitioner and seven others with conspiracy to possess and distribute in excess of 1,000 pounds of marijuana. Count Two charged the same individuals with importation of marijuana into the United States. Count Three charged them with possession with intent to distribute in excess of 1,000 pounds of marijuana.

The petitioner was arraigned on October 9, 1981 and entered a plea of not guilty. A superseding indictment was returned on November 17, 1981. The petitioner entered a plea of not guilty to that indictment on November 24, 1981.

The parties filed and the court considered various motions not relevant to the instant petition. On June 1, 1982, the scheduled trial date, the petitioner failed to appear. A warrant issued for his arrest.

On June 15, 1982, a federal grand jury returned an indictment charging the petitioner with failure to appear, in violation of 18 U.S.C. § 3150. [82-56-Cr-J-20].

The petitioner was arrested on December 3, 1992. He was

arraigned and entered a plea of not guilty to the new indictment on January 7, 1993. The parties again filed, and the court considered, a number of motions not relevant to the instant appeal.

Trial commenced before the Honorable Harvey Schlesinger and a jury on March 12, 1993 on Counts 1 and 3 of Indictment #81-12(S)-Cr-Oc-20 and on #82-56-Cr-J-20. The jury returned guilty verdicts on March 17, 1993.

Judge Schlesinger conducted a sentencing hearing on May 27, 1993 at which a number of witnesses testified. He then continued the matter for further hearing.

On February 16, 1994, Judge Schlesinger heard testimony from one additional witness. Immediately thereafter, he sentenced the petitioner.

On Count 1 of Indictment #81-12(S)-Cr-Oc-20, the court imposed a ten year sentence and a fine of $125,000. The court also imposed a ten year sentence and a $125,000 fine on Count 3, with the sentence to run consecutively with the sentence on Count 1. On Indictment #82-56-Cr-J-20, Judge Schlesinger imposed a five year sentence, to run consecutively with the sentences on #81-12(S)-Cr-Oc-20.

The judgment entered on February 22, 1994, and the petitioner filed a timely notice of appeal on that same day.

On May 30, 1995, the Eleventh Circuit Court of Appeals issued a per curiam decision affirming the petitioner's conviction. (Kravitch, Edmondson, and Fay, JJ.).

As noted above, the Court of Appeals denied the petitioner's suggestion for rehearing en banc on July 20, 1995.

The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231, which vests in the United States district courts jurisdiction over offenses against the laws of the United States.

The appeals court had jurisdiction over the petitioner's appeal pursuant to 28 U.S.C. § 1291, which vests in the United States courts of appeals jurisdiction of appeals from all final decisions of the district court.

B. Summary Of Facts

The Government presented evidence describing a scheme to fly a plane load of marijuana from Columbia to an airstrip in Ocala Florida in September of 1981. Witnesses described extensive preparations for this flight by the petitioner and by several of his associates. According to witnesses, the petitioner and his cohorts purchased and equipped an airplane, hired a pilot, secured the use of a landing strip, purchased a fuel truck and a truck to unload the marijuana, and hired personnel to assist with the unloading.

The flight took place on October 1, 1981. Government agents and local police staked out the area where the plane was to land. As soon as it landed, they surrounded the plane, seized the marijuana, and arrested many of the participants in the scheme. The petitioner was captured and taken into custody.

REASONS FOR GRANTING THE WRIT

I.

IN REJECTING THE DEFENDANT'S CONFLICT OF INTEREST CLAIM, THE COURT OF APPEALS CLEARLY DISREGARDED PRINCIPLES ESTABLISHED BY THIS COURT.

At the February 16, 1994 sentencing hearing, the petitioner's counsel revealed that he had given a specific piece of legal advice to one Kevin Killian even after discovering a conflict of interest between Killian and the petitioner. Killian ultimately followed that advice, to the detriment of the petitioner. He testified against the petitioner at the sentencing hearing, much to the petitioner's detriment. The petitioner argued on appeal that counsel's conduct in advising Killian violated his due process rights under the Fifth Amendment as well as his right to the effective assistance of counsel under the Sixth Amendment. In a single sentence, the panel dismissed the petitioner's claim, stating without citation to any authority that "[d]efense counsel had no conflict of interest." [Appendix D]. The Court of Appeals subsequently denied the Petitioner's suggestion for rehearing en banc.

The petitioner submits that counsel indeed had a conflict of interest, and that the panel's decision to the contrary violated principles established by this Court. In view of the conflict with established precedent, as well as the serious prejudice to the defense, consideration by the Court is appropriate.

A. Facts Relevant To The Issue

Immediately before Killian testified at the petitioner's sentencing hearing, the petitioner's counsel addressed the court as to the subject of the expected testimony:

> The reason I know what Mr. Killian is going to say is Mr. Killian — and I don't know if he was there as a result of some agreement with the government or not—came to my office and asked me to represent him after he was arrested with these two boats. After hearing who he was and what the story was, I told him there would be a conflict for me to represent him since I had represented — I didn't tell him who — but people who were involved with and friends of the person who allegedly sent him to me, and that he should get another lawyer. I could recommend lawyers or he should get his own lawyer. [R7-7[2]].

He then explained that he called A.U.S.A. Innis-Thompson, reported the meeting to her, and "told her [he] couldn't represent [Killian] because [he] believed it was a result of Mr. Rosquete's testimony that Mr. Killian was arrested[.]" [R7-7].

The Government then confirmed that it had sent Killian to defense counsel's office in an effort to locate another of counsel's clients. The Government further confirmed that defense counsel refused to represent Killian based on a conflict of interest. [R7-13].

On direct examination, Killian, a boat dealer and captain, testified that the petitioner purchased two boats from him in late 1992. The petitioner then arranged for Killian to smuggle 1,000 kilograms of cocaine to Spain for a price of $1,000,000. After the petitioner's arrest, he and his associates arranged for the

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2. In referring to the trial transcript, the Petitioner has used the same numbering scheme as in the appeals court.

operation to go forward. At their direction, Killian took the boat out to sea at the appointed time, but the expected delivery of contraband never took place. He later arranged to sell the boats and to keep a portion of the proceeds as his fee. [R7-19-38].

Killian further testified that he ran into the petitioner in jail after his arrest on an unrelated matter. The petitioner told him to say that they met for first time in jail. He further told him that if he kept quiet he would live a lot longer and would receive $30,000 after sentencing. [R7-41].

The petitioner's counsel began his cross-examination by questioning Killian about the meeting in his office. According to Killian, he told the petitioner's counsel what had happened and then told him he had been offered a plea bargain. [R7-43]. The following colloquy then took place:

> Q. Did I say that I couldn't represent you, that there was a conflict?
>
> A. Yes you did. You said you would or could recommend a plea bargain attorney I believe.
>
> Q. Did I tell you that your best bet was to plea bargain and cooperate with the government?
>
> A. You told me — essentially, yes. You told me to do what was in my best interest, but you had alluded to the fact that a plea bargain, if that was the way to go, that was the way I should go. [R7-43-44].

B. Once He Discovered The Conflict Of Interest, Trial Counsel Should Not Have Provided Killian With Any Legal Advice

The duty to avoid conflicts of interest is "perhaps the most basic of counsel's duties[.]" *Strickland v. Washington,* 466 U.S. 668, 692 (1984). In fact, the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel which includes the right to counsel who is unimpaired by conflicting loyalties. *Cuyler v. Sullivan,* 446 U.S. 335, 345 (1980). In order to establish a Sixth Amendment violation, the defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350. *See Strickland v. Washington,* 466 U.S. at 692. Once it is established that both prongs of the *Cuyler* test—actual conflict and adverse impact on representation—have been met, a defendant need not show prejudice in order to obtain reversal of his conviction." *Id. See Burger v. Kemp,* 483 U.S. 776, 783 (1978); *Porter v. Singletary,* 14 F.3d 554, 560 (11th Cir. 1994). "[I]n the case of an actual conflict, prejudice is presumed." *Danner v. United States,* 820 F.2d 1166, 1169 (11th Cir. 1987), *cert. denied,* 484 U.S. 1012 (1988). *See id.* at 349-350.

Notwithstanding the decision of the appeals court, an actual conflict of interest occurred when, after recognizing the potential conflict, the petitioner's counsel advised Killian to enter into a "plea bargain and cooperate with the government." [R7-43-44]. Where the petitioner's counsel knew that Killian had probably been arrested as a result of information supplied by the petitioner, and where Killian claimed to have worked for the petitioner, counsel effectively "advise[d] a key witness to implicate his own client." *Burden v. Zant,* 24 F.3d 1298, 1306 (11th Cir. 1994). *Contrast Dukes v. Warden,* 406 U.S. 250, 256 (1972) (petitioner failed to identify an actual lapse in representation).

Moreover, although the petitioner need not show actual prejudice in order to obtain relief, in this case the conflict clearly compromised counsel's representation of the petitioner. Killian ultimately followed counsel's advice, to the petitioner's detriment. His cooperation with the Government required him to testify against the petitioner at his sentencing hearing, and he provided extremely damaging testimony. That testimony likely caused the trial judge to impose a stiffer sentence than he otherwise would have imposed. *Compare Burden v. Zant*, 498 U.S. 433, 434-436 (1991); *Ruffin v. Kemp*, 767 F.2d 748, 751-752 (11th Cir. 1985).

Counsel correctly recognized the conflict between Killian's interests and those of the petitioner. In fact, he advised Killian of the conflict and quite appropriately declined the representation. However, once he recognized the potential conflict, he should have terminated the conversation with Killian. Under no circumstances should he have offered Killian any legal advice.

Based on the authority set forth above, counsel's breach of his duty to his client should have entitled the petitioner to resentencing. The decision of the appeals court to the contrary conflicted with the principles articulated by this Court. In these circumstances, the petitioner's petition for a writ of certiorari should be granted.

CONCLUSION

For the reasons stated above, the writ should be granted and the case set down for argument.

Respectfully submitted,

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APPENDIX A — ORDER DENYING SUGGESTION FOR REHEARING EN BANC FILED JULY 20, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2218 & 94-2219

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEONARDO FIRMO ROSQUETTE,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH and EDMONDSON, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

Appendix A

* * *

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN *UNITED STATES V. ROSQUETTE*, __ F.3d __ (11TH CIR. 1995) FILED MAY 30, 1995

IN THE UNITED COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 94-2218, 94-2219
Non-Argument Calendar

D.C. Docket Nos 81-12(S)-Cr-Oc-20
82-56-CR-J-20

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEONARDO FIRMO ROSQUETTE,

Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

(May 30, 1995)

Before KRAVITCH and EDMONDSON, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

Appellant was convicted on charges of conspiracy to possess

and distribute in excess of 1,000 pounds of marijuana, possession with intent to distribute in excess of 1,000 pounds of marijuana and failure to appear for trial. On appeal he urges three areas of error:

> 1. Repeated instances of the prosecutor introducing evidence of serious misconduct unrelated to this case.
>
> 2. Prejudicial testimony concerning the home address of a government witness with the inference of intended retribution by the defendant.
>
> 3. Improper conduct by defense counsel in allegedly giving legal advice to an adverse witness who testified at sentencing.

We have studied these arguments and reviewed the record as to the factual circumstances surrounding them. We conclude that there is no reversible error present. Much of the testimony was admissible in response to issues raised by the defendant. Some was objected to with the objection being sustained and the defendant declining an offer by the trial court to further instruct the jury. Defense counsel had no conflict of interest.

The judgment of the district court is affirmed.

APPENDIX C — JUDGMENT-INDICTMENT
#81-12(S)-Cr-Oc-20

94-2218

UNITED STATES DISTRICT COURT
MIDDLE District of FLORIDA

Case Number: 81-12(S)-Cr-Oc-20

Fred A. Schwartz, Esq./Rosemary T. Cakmis, Esq.
Defendant's Attorney

UNITED STATES OF AMERICA

V.

LEONARDO FIRMO ROSQUETTE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed Prior to November, 1987)

THE DEFENDANT:

* * *

☒ was found guilty on count(s) *One and Three of the Indictment* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Appendix C

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. 846	Conspiracy to possess with intent to distribute marijuana.	October 1981	One
21 U.S.C. 841	Possession with intent to distribute marijuana	October 1981	Three

* * *

IT IS THE JUDGMENT OF THIS COURT THAT: as to Count One, defendant is committed to the custody of the Attorney General or his duly authorized representative to be imprisoned for a term of TEN (10) YEARS.

Defendant shall pay a fine to the United States in the amount of $125,000.00, to be paid immediately.

IT IS FURTHER ADJUDGED that as to Count Three, defendant is committed to the custody of the Attorney General or his duly authorized representative to be imprisoned for a term of TEN (10) YEARS. The sentence of imprisonment on Count Three shall run consecutively to the imprisonment on Count One.

Defendant shall pay a fine to the United States in the amount of $125,000.00, to be paid immediately.

Defendant shall serve a special parole term of TEN (10) YEARS on Count Three only. THE TOTAL TERM OF IMPRISONMENT

Appendix C

IS TWENTY (20) YEARS IN THIS CASE AND TOTAL FINES IN THE AMOUNT OF $250,000.00 IN THIS CASE.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

☒ The court orders commitment to the custody of the Attorney General and recommends:
FCI Miami.

Defendant's Soc. Sec. No.: *265-76-4038*

Defendant's Date of Birth: *November 6, 1941*

Defendant's Mailing Address:
6945 Maple Terrace
Miami Lakes, FL 33014

Defendant's Residence Address:
6945 Maple Terrace
Miami Lakes, FL 33014

February 16, 1994
Date of Imposition of Sentence

s/ *Harvey E. Schlesinger*
Signature of Judicial Officer

Appendix C

HARVEY E. SCHLESINGER, U.S. District Judge
Name & title of Judicial Officer

Feb 22, 1994
Date

* * *

APPENDIX D — JUDGMENT-INDICTMENT
#82-56-Cr-J-20

94-2219

UNITED STATES DISTRICT COURT
MIDDLE District of FLORIDA

Case Number: 82-56-Cr-J-20

Fred A. Schwartz, Esq./Rosemary T. Cakmis, Esq.
Defendant's Attorney

UNITED STATES OF AMERICA

V.

LEONARDO FIRMO ROSQUETTE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed Prior to November 1, 1987)

THE DEFENDANT:

* * *

☒ was found guilty on count(s) *One of the Indictment* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Appendix D

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 3150	Failure to Appear.	June 1982	One

* * *

IT IS THE JUDGMENT OF THIS COURT THAT: defendant is committed to the custody of the Attorney General or his duly authorized representative to be imprisoned for a term of FIVE (5) YEARS.

Said sentence of imprisonment shall run consecutively to the sentences of imprisonment imposed in Case No. 81-12(S)-Cr-Oc-20, for a TOTAL TERM OF IMPRISONMENT OF TWENTY-FIVE (25) YEARS in both cases.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

☒ The court orders commitment to the custody of the Attorney General and recommends:
FCI Miami.

Defendant's Soc. Sec. No.: *265-76-4038*

Defendant's Date of Birth: *November 6, 1941*

Appendix D

Defendant's Mailing Address:
6945 Maple Terrace
Miami Lakes, FL 33014

Defendant's Residence Address:
6945 Maple Terrace
Miami Lakes, FL 33014

February 16, 1994
Date of Imposition of Sentence

s/ *Harvey E. Schlesinger*
Signature of Judicial Officer

HARVEY E. SCHLESINGER, U.S. District Judge
Name & Title of Judicial Officer

Feb. 22, 1994
Date

* * *